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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 684

AMANA REFRIGERATION, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO. _____

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vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Amana Refrigeration, Inc. (hereinafter referred to as "Amana") prays that a Writ of Certiorari issue to review the judgment entered in this case on October 30, 1961 by the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported, sub. nom. *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.*, in 295 F. 2d 375 (Adv. Sheet No. 3, December 11, 1961) and is printed in its entirety in Appendix A hereto. The order of the District Court dismissing

Amana's amended counterclaim is printed in its entirety in the appendix (attached to Amana's brief) filed by Amana in the Court of Appeals, nine additional copies of which have been filed with this petition pursuant to Rule 21(4) of the Rules of this Court. The District Court wrote no opinion.

JURISDICTIONAL GROUNDS

The judgment order of the Court of Appeals, printed in Appendix B hereto, was entered on October 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Inasmuch as Amana's amended counterclaim was dismissed for failure to state a claim upon which relief can be granted, the questions presented in this petition are *legal* questions unencumbered by evidentiary matters or factual issues of any kind. The answers to these questions are dependent solely upon an interpretation of two provisions of the Clayton Act. In its broadest scope the overriding question thus presented is as follows:

> In connection with their principal business of selling television time, may the television networks legally engage in the particular kinds of injurious competitive practices prohibited by the Clayton Act on the sole basis that television time is not a "commodity"?

Three subsidiary and specific questions are presented:

1. Is Section 2(a) of the Clayton Act applicable to discrimination in the sale of television time by a television network?

2. Is Section 3 of the Clayton Act applicable to a network's "must buy" policy, i.e., the policy under which

the sale of any television time is conditioned on the purchase of time over a specified group of stations?

3. Is Section 3 of the Clayton Act applicable to tie-in sales of network television time and network television programs, i.e., sales of time on the condition that the buyers thereof purchase programs in which the network has a financial interest?

The Court below answered all three questions in the negative, thereby granting to the networks *for the first time* what is tantamount to an immunity from the proscriptions of Sections 2 and 3 of the Clayton Act. By means of this petition Amana hopes to gain access to this Court for the purpose of challenging the validity of such immunity.

STATUTES INVOLVED

The statutory provisions involved herein are Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. §13(a), printed in Appendix C hereto (the "pertinent provisions" of which are set forth in footnote 2 to the opinion of the Court below), and Section 3 of the Clayton Act, 15 U.S.C.A. §14, printed in Appendix D hereto and set forth in footnote 3 to the Court's opinion.

STATEMENT OF THE CASE

This suit was brought against Amana by Columbia Broadcasting System, Inc. (hereinafter referred to as "CBS") to recover damages for an alleged breach of certain agreements between Amana and CBS relating to Amana's sponsorship of "The Phil Silvers Show" over the CBS television network. This contractual claim of CBS, having been settled by the parties, is no longer involved in the case. The claims which are involved—to the limited extent of whether

they are legally sufficient—are the three claims asserted by Amana in its amended counterclaim against CBS. These claims are set forth in full in the appendix (pp. 6 to 11) to Amana's brief filed in the Court of Appeals, copies of which have been filed herewith.

Amana's three claims can be briefly described as follows:

First Cause of Action

In this claim Amana charges CBS with a violation of Section 2(a) of the Robinson-Patman Act. The gist of this claim is that CBS discriminated between Amana and certain of its competitors in the sale of "Class A" television time over the CBS network. This discrimination stemmed from the cumulative quantity discount practice followed by CBS, Amana receiving a 5% discount as against a 25% discount obtained by some of its competitors. The result of this discriminatory pricing practice was the injury of competition between Amana and its competitors.

Second Cause of Action

In this claim Amana charges CBS with a violation of Section 3 of the Clayton Act. This claim centers around the policy of CBS, known as the "must buy" policy, which requires an advertiser, as a condition to purchasing any time over the network, to purchase time over a *specified* group of stations. The imposition of this "must buy" policy results in a foreclosure by CBS and its affiliated stations of a substantial share of the market for television time and thereby injures competition among operators of television stations. Additionally, this policy is detrimental to advertisers, in that those who cannot afford to purchase time over the entire required group of stations

are thereby virtually precluded from purchasing any time over the CBS network, and those who can afford to do so are compelled to utilize undesired stations in lieu of those which are preferred.

Third Cause of Action

In this claim Amana charges CBS with a second and distinct violation of Section 3 of the Clayton Act. This claim alleges a tie-in between CBS network television time and television programs owned or controlled by CBS. The gist of this claim is that CBS, pursuant to an established policy of favoring its own programs, refused to sell its network time to Amana for use in sponsoring an independently produced program; only when Amana agreed to purchase a program owned by CBS was the sale of time-plus-program consummated. The result of this tie-in policy, which prevents independent producers of television programs from competing on their own merits for advertisers' business and abridges the advertisers' freedom of choice, is the foreclosure by CBS of a substantial share of the market for such programs.[1]

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1. In its initial counterclaim, Amana alleged that the conduct described in both the Second and Third Causes of Action constituted a violation of the Sherman Act as well as the Clayton Act. Presumably for this reason, CBS directed its initial motion to dismiss against only the First Cause of Action, the price discrimination claim. This motion was granted and the District Court entered a Rule 54(b) order to permit an immediate appeal regarding the legal sufficiency of that claim. On appeal, after the merits were fully briefed and argued, the Court of Appeals granted the CBS motion to dismiss the appeal, predicating its decision solely on its determination that the District Court had abused its discretion in entering the Rule 54(b) order. 271 F. 2d. 257 (1959); cert. den. 362 U. S. 928 (1960). After remand, Amana amended its counterclaim by the elimination of any reference to the Sherman Act, thus making the legal sufficiency of all three causes of action dependent upon stating claims under the Clayton Act.

Amana further alleges that each of the three claims described above has injured Amana in its business and that Amana is therefor entitled, under Section 4 of the Clayton Act, to threefold the damages sustained. *The sufficiency of Amana's allegations of injury, either to competition or to itself, have not been challenged by CBS.*

The District Court's dismissal of all three Causes of Action for failure to state claims upon which relief can be granted was affirmed by the Court of Appeals. As more fully explained below, the decision of the Court of Appeals was based on its conclusion that television time, which it described as "the privilege of having itself identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising its products" (Appendix, A-5), was not a "commodity"—either for purposes of Section 2(a) or Section 3 of the Clayton Act. *The long-standing "commodity" question is thus squarely presented to this Court for the first time.*

REASONS FOR GRANTING THE WRIT

Amana's petition should be granted because the decision of the Court below clearly presents, in the words of Rule 19 of the Rules of this Court, "an important question of federal law which has not been, but should be, settled by this Court." There are various facets to the importance of this "commodity" issue which will be discussed sequentially: First, its importance in terms of the application of principles of statutory construction which control its resolution; second, its importance in terms of providing the much-needed clarification of two of the basic provisions of the anti-trust laws; and third, its importance in terms of the far-reaching consequences of a final determination

of the question. In short, a final decision by this Court would be significant, not only to the television, radio and publications industries and the advertisers using those media, but also to the federal courts charged with the responsibility of construing the laws governing the nation's competitive system.

A. The Decision Of The Court Below Should Be Reviewed By This Court Because It Is In Conflict With Basic Principles Of Statutory Construction Laid Down By This Court.

The focus here is upon the question of whether, in construing a statute, its clear remedial purpose can be subservient to its inconclusive wording. The Court below indicated no disagreement whatever with Amana's position that the discriminatory and tie-in practices alleged in its amended counterclaim were precisely the types of practices sought to be eliminated by Section 3 of the Clayton Act and Section 2(a) thereof, as amended by the Robinson-Patman Act.[2] Notwithstanding this apparent concurrence with Amana's contentions regarding the underlying purpose of these statutory provisions, the Court of Appeals reached its decision on the basis of the particular words appearing in a single phrase of Section 3 of the Clayton Act—"goods, wares, merchandise, machinery, supplies, and other commodities"—a phrase which does not occur in Section 2(a) under which the First Cause of Action was brought. This complete reliance on wording in disregard of legislative purpose is misplaced, particularly when considered in light of the fact that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." *Automatic Canteen Co.* v. *F.T.C.*, 361 U.S. 61, 65; 73 S. Ct. 1017, 1020 (1953).

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2. With respect to the remedial purpose of the Robinson-Patman Act, see *F.T.C.* v. *Morton Salt Company*, 334 U.S. 37, 68 S. Ct. 822 (1948) and *F.T.C.* v. *Henry Broch & Co.*, 363 U.S. 166, 80 S. Ct. 1158 (1960). With respect to Section 3 of the Clayton Act, see *International Salt Co.* v. *United States*, 332 U.S. 392, 68 S. Ct. 12 (1948) and *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 69 S. Ct. 1051 (1949).

It is clear that this narrow contextual reason was the sole basis for the Court's conclusion that "the contractual right or privilege of sponsorship identification"—television time—could not be deemed a "commodity."[3] In the process of reaching its decision the Court rejected the principal arguments of CBS. It flatly stated that the legislative history of these provisions was inconclusive. It expressly rejected the CBS contention that the "commodity" issue could be decided on the basis of case law, the Court observing that the cited cases were either irrelevant or "afford no real guide to resolution of the issue" (Appendix, A-6). And it declined to place any reliance whatever on the other arguments of CBS based on administrative interpretation, text materials and "practical" construction of the advertising industry.[4]

The Court below therefor directed its attention solely to the phraseology of the statute. Its rejection of the clear remedial purpose of the Clayton Act as a necessary guide to the interpretation of its ambiguous context flies in the face of principles of statutory construction laid down by this Court. In *Vermilya-Brown* v. *Connell*, 355 U.S. 377, 69 S. Ct. 140 (1948) and *S.E.C.* v. *Ralston-Purina Co.*, 346 U.S. 119, 73 S. Ct. 981 (1953), to cite but two examples, this Court emphasized the importance of legislative purpose in construing statutory provisions. In both cases the statutory wording at issue ("possession of the United States"; "public

3. While the Court below rejected the CBS argument that television time should be considered as "services", it did find that program production involved only services, an argument not asserted by CBS. Accordingly, the Court held Amana's Third Cause of Action insufficient for the additional reason that Section 3 of the Clayton Act does not apply to tie-ins involving services.

4. The Court also rejected the CBS alternative argument directed against the First Cause of Action, namely, that no two segments of television time are "of like grade and quality". The Court stated that ". . . we regard it to involve a factual issue not presented by the pleadings." (Appendix, A-6)

offering") was, on its face, much more susceptible to a restrictive interpretation than "commodity", but the statutes were liberally construed so as to effectuate the public policy underlying the legislation.

The principle that legislation must be interpreted so as to effectuate its remedial purpose has been applied with particular emphasis to the anti-trust laws. In three recent cases preceding the instant case, the Seventh Circuit narrowly interpreted the particular trade regulation statute involved, basing its decision in each case primarily on statutory context and without regard to legislative purpose. In each case this Court reversed the Seventh Circuit's restrictive interpretations of the statutes and underscored in its opinion the importance of the remedial aim of the statute in determining its scope: *F.T.C.* v. *Mandel Bros., Inc.*, 359 U.S. 385, 79 S. Ct. 818 (1959); *F.T.C.* v. *Henry Broch & Co.*, 363 U.S. 166, 80 S. Ct. 1158 (1960), rehearing denied, 81 S. Ct. 30 (1960); *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 80 S. Ct. 1267 (1960). The rationale of the interpretive principles applied in those cases was succinctly stated by Mr. Justice Frankfurter, speaking for the Court in *United States* v. *Shirey*, 359 U. S. 255, 260; 79 S. Ct. 746, 749 (1959):

> "Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.' . . . Statutory meaning, it is to be remembered, is more to be felt than demonstrated, see *United States* v. *Johnson*, 221 U. S. 488, 496, 31 S. Ct. 627, 55 L. Ed. 823, or as Judge Learned Hand has put it, the art of interpretation is 'the art of proliferation of purpose'."

The decision of the Court below, predicated on but a small piece of statutory language and obviously reached without consideration of manifest legislative purpose, is in

conflict with the above-stated principles of statutory construction. It is important that the resolution of the "commodity" question not be allowed to stand on such an artificial basis.

B. The "Commodity" Question Should Be Resolved By This Court So As To Eliminate A Patent Ambiguity In The Clayton Act.

It is perhaps necessary for the achievement of particular legislative objectives that certain statutes, such as the Sherman Act, be enacted in very broad language. The resultant vagueness of the legislation is deemed justified on the ground that use of less general language might defeat the overall objectives of the statute. Vagueness resulting from *ambiguity*, however, is never justifiable, and it is especially important to resolve an ambiguity, as soon as it is feasible to do so, when it occurs in a statute, like the the Clayton Act, which is directed against *particular* types of anti-competitive practices. The existence of ambiguities in such legislation seriously undermine its effectiveness.

That a troublesome ambiguity does surround the word "commodity" is beyond question. What was said by Mr. Frederick M. Rowe in 1956 (citing *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 73 S. Ct. 872 (1953)) is as true today as it was then:

> "Just what constitutes a 'commodity' within the meaning of the Clayton Act remains a hazy proposition." *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*. 66 Yale L.J. 1, 16 (1956).

Certainly the opinion of the Court below will not serve to dispel any of the confusion. One of the principal contentions of CBS is that the meaning of "commodity" is *tangible* commodity (though Congress used no such limiting adjective), but the Court declined to so hold. Concluding

that the true nature of television time was a "contractual right or privilege of sponsorship identification"—an *intangible*—the Court simply held that such a privilege could not fall within the meaning of "commodity". It is implicit in its rejection of the CBS argument that the Court was of the opinion that the statute did apply, or at least might apply, to intangibles other than television time. Yet it distinguished the state court decisions holding insurance, electricity and telephone service to be "commodities" on the ground that the only *similarity* between those commodities and television time was their intangible nature. (Appendix, A-5) If that is the similarity, what is the essential *difference*—in terms of the "commodity" issue? What is the yardstick? The scope of "commodity"—and therefore the scope of two of the most important provisions of the anti-trust laws—remains, indeed, "a hazy proposition".

The opinion of this Court in *Times Picayune* touched upon the "commodity" question, but this Court found it unnecessary on that occasion to decide it. Reference to this continuing ambiguity was made by the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F.2d 522 (2nd Cir. 1956):

> "The correctness of the dismissal of this action raises, however, important and *apparently unresolved questions under the Clayton Act*. Thus, the Supreme Court

5. In both *News Inc.* v. *Lindsay Newspapers, Inc. et al.*, Civil Action No. 3478, (S.D. Fla.) and *Beacon Newspaper Co.* v. *Wichita Eagle Publishing Co.*, Civil Action No. W-1937 (D. Kansas), the plaintiffs, as did Arizona, relied on *Times-Picayune* to support their position that tie-in selling of advertising space was proscribed by the Clayton Act. (Motions to dismiss the complaints, predicated in part on the absence of a "commodity", were denied in both cases without opinion.) On the other hand, CBS, in its brief filed in the Court below, cited two text writers for the proposition that the *Times-Picayune* case supported the conclusion that the Clayton Act did not reach "contracts for services". In all probability, the *Times-Picayune* decision will continue to be cited by opposing litigants until the "commodity" question is resolved by this Court.

reserved in the Times-Picayune case the question whether advertising space is a 'commodity' within the meaning of Section 2 of the Act. See 345 U.S. at Page 610, note 27, and cases cited." (236 F.2d at 527; emphasis added.)

Consequently, the question of whether discriminatory sales of *radio* broadcast time are prohibited by the Robinson-Patman Act is still pending in the *Syracuse* case.

An ambiguity is particularly troublesome when it involves one of the basic elements of a specific statutory prohibition. The existence of a "commodity" is essential to a violation of both Section 2(a) and Section 3 of the Clayton Act. While there are other areas of unsettled law under these provisions, the scope of "commodity" remains one of the most important questions awaiting clarification by this Court. This petition, which presents the "commodity" issue unencumbered by any evidentiary or factual dispute (similar to the "discrimination" issue in *F.T.C.* v. *Anheuser-Busch Inc.*, 363 U.S. 536, 80 S. Ct. 1267 (1960)), provides an ideal and compelling opportunity for its ultimate resolution.

C. The "Practical" Importance Of The "Commodity" Question.

Over and above the importance of the "commodity" question in terms of basic principles of statutory construction and the necessity for clarification of the Clayton Act, the question is important because of the far-reaching consequences of a final determination of the statute's scope. The precedential value of such a determination lies in the fact that it would directly affect entire industries and hundreds of individual companies. And it would settle a question

which otherwise will continue to be raised in the federal courts with increasing frequency.[6]

While the companies most directly involved are those engaged in television and radio networking, the entire publications industry, as well as all of the individual advertisers using such media, will be affected by a final decision on the "commodity" question. In connection with its argument that whatever has been done for a considerable length of time is, for that reason, in accordance with the law, CBS has stated that the practice of granting cumulative volume discounts is common to the television and radio networks, as well as to many magazines and newspapers. Details as to this practice were submitted to the Court below in the CBS appendix, copies of which have been filed herewith. CBS also claims—again, as an argument for their legality—that various "package advertising plans" have long been used in these industries.

Amana does not subscribe to the view that these practices are necessarily legal because they are common. Nor does Amana agree with the unsupported CBS contention that their elimination would cause undue "disruption" or with the underlying assumption that such is a relevant consideration. In any event, what is important here is that these CBS arguments completely foreclose it from now denying the importance of the "commodity" issue.

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6. While the *Wichita Eagle Publishing Co.* case referred to above was settled before any specific decision on this issue, the "commodity" question remains pending in *News, Inc.* v. *Lindsay Newspapers, Inc.*, Civil Action No. 3478 (S.D. Fla.), and in the *Syracuse Broadcasting Corp.* case pending in the Northern District of New York. (For holdings of the Second Circuit on other issues in the case, see 236 F.2d 522 (1956), 271 F.2d 910 (1959) and 1961 Trade Cases, ¶70,130). Additionally, the identical issue is involved in a suit recently filed in the Southern District of New York, *Hazel Bishop Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, Civil Action No. 61-2161. The "commodity" question was raised tangentially, but never decided, in *Scott Publishing Co., Inc.* v. *Columbia Basin Publishers, Inc.*, 180 F. Supp. 754 (W.D. Wash. 1959); aff. 293 F.2d 15 (9th Cir. 1961); cert. den. 82 S.Ct. 382 (1961), although a motion to dismiss the complaint, predicated in part on the ground that newspaper advertising space was not a "commodity," was denied without opinion by Judge Bowen.

The significance of the "commodity" issue in terms of its potential impact upon the hundreds of companies involved in advertising is indisputable. More importantly, what is at stake in this case is the principle of equal treatment of all customers competing in the market place and the principle of freedom of choice based on competitive merit. These cornerstone principles of our anti-trust laws cannot be cast aside in deference to ambiguous statutory wording or fervent pleas for maintaining the status quo. For this reason alone it is imperative that the decision of the Court below be reviewed by this Court and the "commodity" issue be ultimately resolved.

CONCLUSION

For each of the foregoing reasons, we earnestly urge that this Court's writ of certiorari issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

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January 22, 1962

APPENDICES

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1961—SEPTEMBER SESSION, 1961

No. 13282
COLUMBIA BROADCASTING SYSTEM, INC.
Plaintiff-Appellee,
v.
AMANA REFRIGERATION, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 30, 1961

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* This appeal is from the District Court's order dismissing a three-count counterclaim of Amana Refrigeration, Inc., defendant-appellant, for failure to state a claim upon which relief can be granted. The counterclaim was filed in a diversity action brought by Columbia Broadcasting System, Inc., plaintiff-appellee, for monies alleged to be due under agreements for the production and broadcasting of a television program by CBS under Amana's sponsorship over certain broadcasting stations affiliated with the CBS television network. An amount claimed as a set-off by Amana's answer was

later waived. The District Court entered judgment for CBS on its contract claim and dismissed Amana's amended counterclaim on CBS' motion that none of the three counts state a claim upon which relief can be granted. The issue on Amana's appeal is thus limited to the legal sufficiency of its counterclaim.

Each count or alleged cause of action of the counterclaim avers in substance that Amana entered into a "facilities" agreement and a "program" agreement, constituting one integral contract, with CBS "covering the sale of network television time" by CBS to Amana and "covering the production and sale of the program purchased" by Amana from CBS, and pursuant to which contract Amana sponsored a series of television programs, broadcast from New York on alternate Tuesdays from 8:30 to 9:00 P.M.[1]

Count I charges that CBS violated Section 2(a) of the Clayton Act (15 U.S.C.A. §13(a))[2] and damaged Amana by granting greater discounts, on the basis of quantity, to other sponsors of "Class A time" evening hour programs, including competitors of Amana. Count II charges violation

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1. By amendment of the "facilities" agreement the later portion of the series was broadcast from 8:00 to 8:30 P.M.

2. The pertinent provisions of 15 U.S.C.A. §13(a) are:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

of Section 3 of the Clayton Act (15 U.S.C.A. §14)[3] and consequent damage to Amana by the requirement of CBS, as a condition of network broadcasts, that Amana "purchase network time" over a specified group of television stations which included all of the stations owned and operated by CBS and certain affiliated stations. Count III charges an additional Section 3 violation to Amana's damage by the refusal of CBS to "sell network time" of Amana's choice to Amana unless the latter agreed to sponsor a program in which CBS had a financial interest. Treble damages are sought pursuant to Section 4 of the Clayton Act. (15 U.S.C.A. §15).

The main contested issues presented by Amana's appeal are:

(1) Whether the allegations of Count I of the counterclaim set forth price discrimination in transactions involving purchasers of commodities of like grade and quality.

(2) Whether the allegations of Counts II and III set forth prohibited tie-in practices in connection with a lease, sale, or contract for the sale of goods, wares, merchandise, machinery, supplies, or other commodities.

---

3. 15 U.S.C.A. §14 provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Amana contends that the legal sufficiency of all three counts of its counterclaims hinges upon the scope of the term "commodity" as used in Sections 2(a) and 3 of the Clayton Act. It argues that the term includes the subject matter of the integrated agreements although intangible and that in common parlance television "time" is "purchased" and "sold". It relies on the remedial purpose of the statute as evincing Congressional intent that "commodity" be accorded its broadest meaning and asserts that nothing in the legislative history of the enactment requires restricting its scope.

CBS contends that no purchase, sale or lease of a commodity is here involved, that the essence of the contract is the rendition of services, an intangible, which legislative history and court decisions demonstrate is beyond the reach of Sections 2(a) and 3. Further, CBS relies on administrative interpretation, practical construction by the advertising industry and statements of text writers.

Neither the facilities agreement nor the program agreement is set forth in CBS' complaint or in Amana's counterclaim nor incorporated as an exhibit. Amana has elected to plead the legal effect of the integrated agreements. *Cf. Graffius* v. *Weather-Seal, Inc.*, D. C. Ohio 1946, 7 F. R. D. 125. While the CBS Network Rate Card #11, attached to the initial answer as Exhibit I, and incorporated by reference in the counterclaim, discloses that the time duration of the broadcast is used to measure its cost to the sponsor we are of the opinion that the reasonable inferences to be drawn from the allegations concerning the written agreements do not admit of the transaction being accurately characterized as a "sale" of television "time" as it is labeled by Amana nor as merely a "services" contract as argued by CBS. Although both services and time are involved we conclude that in its essence the contract alleged is a purchase by

Amana of the privilege of having itself identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising its products.

We are mindful of the fact that dictionary definitions of the word "commodity" have included its use in the sense of "privilege". See: *Beechley* v. *Mulville*, 102 Iowa 602, 608, 70 N. W. 107, citing Anderson's Law Dictionary. But here we must evaluate the word in the context in which it appears—the purchase, lease or sale of goods, wares, merchandise, machinery or supplies.

We have carefully considered the legislative history cited by the parties but find nothing therein which we regard as conclusive on the issue before us. Nor have we been cited any case which is determinative. Our own research has produced none. Amana's reliance on state court decisions holding insurance,[4] electricity,[5] and telephone service[6] to be commodities is misplaced. There is little similarity between those subject matters and the "privilege" here secured as a matter of contract right and obligation except the intangible quality they all share.

Moreover, we are of the opinion that the most reliable guide to the meaning of the word "commodity" is the context in which it is employed and in our considered judgment the context here—goods, wares, merchandise, machinery and supplies—does not permit an application of the term which embraces the contractual right or privilege of sponsorship identification with the broadcast of a television program and the use of a portion of the broadcast time for product advertising. And, the remedial purpose

4. *Speegle* v. *Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P. 2d 867; *Beechley* v. *Mulville*, 102 Iowa 602, 70 N.W. 107.

5. *State ex rel. Spillman* v. *Interstate Power Co.*, 118 Neb. 756, 226 N.W. 427.

6. *McKinley Tel. Co.* v. *Cumberland Tel. Co.*, 152 Wis. 539, 140 N.W. 38.

of legislation is not to be derived by rejection of the context of its expression.

It would serve no useful purpose to discuss all of the cases or the text materials cited by the parties. Our conclusion as to the essential nature of the contract makes some of them irrelevant. The others afford no real guide to resolution of the issue. We have, however, considered all of Amana's contentions.

We do not find it necessary to reach the question tendered by CBS' argument that Count I is insufficient for the reason that television broadcasts are not of "like grade and quality" except to indicate that we regard it to involve a factual issue not presented by the pleadings. Although no two programs present the same artistic, educational or entertainment value to all persons it may well be that so-called prime time programs which have demonstrated comparable audience drawing power would be of like grade and quality from a commercial standpoint to prospective sponsor-advertisers.

Count III predicates liability on a prohibited tie-in of the production of the program material for the broadcasts. It thus falls within the purview of *United States* v. *Jerrold Electronics Corporation*, E.D.Pa. 1960, 187 F. Supp. 545, aff. 365 U.S. 567 and is insufficient for the additional reason that 15 U.S.C.A. §14 does not apply to tie-ins involving services.

It is our conclusion that the District Court did not err in dismissing Amana's counterclaim.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, October 30, 1961

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WM. G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff-Appellee*, No. 13282 v. AMANA REFRIGERATION, INC., *Defendant-Appellant*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. §13 (a), reads as follows:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destory or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall

prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

APPENDIX D

Section 3 of the Clayton Act, 15 U.S.C.A. §14, reads as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 684

AMANA REFRIGERATION, INC.,
Petitioner,

—against—

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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February 21, 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

AMANA REFRIGERATION, INC.,
Petitioner
against
COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent

No. 684

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a contractual arrangement under which CBS performed the services necessary to produce and broadcast a television program (The Real Silvers Show) under Amana's name, which involved no purchase or transfer of goods within the meaning of Section 2 of the Clayton Act (15 U.S.C. § 13) or any sale or lease of commodities, merchandise, machinery, supplies or other property within the meaning of Section 3 of the Clayton Act (15 U.S.C. § 14)?

STATEMENT OF THE CASE

Respondent (CBS) brought this action to recover $284,545.21 from petitioner (Amana) for services rendered by CBS in connection with producing and broadcasting The

Phil Silvers Show under Arutan's sponsorship over the CBS Television Network. CBS services were rendered pursuant to two agreements: a Program Agreement (R. App. 7-8)* covering production of the program, and a Facilities Agreement (R. App. 21-30)* providing for its broadcasting.**

Arutan answered, admitting liability for all except $33,111.27 of the amount claimed, and filed a three-count counterclaim for treble damages of approximately $1,000,000 by reason of CBS' alleged violation of the antitrust laws in connection with the production and broadcast of The Phil Silvers Show. The first count alleged that CBS had violated Section 2 of the Sherman Act by requiring certain unwanted advertisers sponsoring unsold time on programs produced by CBS as a condition to CBS' charges them in full granted Arutan. The second and third counts alleged violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act, the second count claiming that CBS, a producer of sponsorship, Arutan had illegally been required to sponsor the broadcast over a specified group of stations

* The "R. App." refers to respondent's appendix in the court below, a joint appendix filed with the petition. Similarly, "P. App." refers to the petitioner's appendix filed in support of which were also filed with the petition. The petitioner is referred to as "Del."

** Under the Program Agreement, CBS provided [illegible] the services of the cast and the production staff, [illegible] the use of camera studios, [illegible] and other production facilities and all the miscellaneous services, personnel and equipment necessary for the production of the program.

central broadcasting facilities and operating personnel for the transmission of the broadcast, [illegible] arrange for the cable and microwave relays which connect these facilities with affiliated stations, [illegible] arrange for the local broadcast of the program with the 135 stations selected by Arutan, and to provide a host of related services including publicity, centralized billing, procurement of performing rights to musical material, delayed [illegible] broadcasts in special areas, etc.

comprising the basic CBS network, and the Third Count charging that CBS refused Amana the opportunity of broadcast sponsorship unless Amana sponsored The Phil Silvers Show, in which CBS allegedly had a financial interest, in lieu of an unnamed program in which CBS had no such interest.

On CBS' motion the First Count was dismissed on the ground that no "purchase" of "commodities" was involved. Amana's appeal from that order was dismissed by the Court of Appeals as not appealable, 274 F. 2d 257, 1959). Amana sought certiorari claiming, *inter alia*, that this Court should decide whether the broadcasting services rendered were "commodities" within the meaning of Section 2(a) of the Clayton Act. Certiorari was denied, 362 U.S. 928 (1960), No. 710, October Term, 1959.

[illegible] Amana then amended its complaint and, having eliminated its Sherman Act claims by formal release, CBS moved to dismiss these claims from the Second and Third Counts. Thus, Amana relied exclusively on Section 2(a) and 3 of the Clayton Act. (R. App. 12). CBS submitted a certified and documented reply contravening the essential allegations of the counterclaim. (R. App. 14). CBS also moved to dismiss all three counts of the counterclaim on the grounds that the agreements involved purchases of "commodities" and not "commodities" within the meaning of Section 2(a) of the Clayton Act, no lessee [illegible] (R. App. 12-14). The District Court dismissed all three counts. (R. App. [illegible] and entered judgment for CBS on its complaint. (R. App. [illegible]).

Amana appealed the dismissal of its counterclaim (R. App. [illegible]). The Court of Appeals affirmed, 295 F. 2d

375, concluding that what Amana received under the contractual arrangement was simply "the contractual right or privilege of sponsorship identification with the broadcast of a television program and the use of a portion of the broadcast time for product advertising". (Pet. A-5). It held that such right or privilege was not a commodity within the meaning or intent of either Section 2(a) or Section 3. Dismissal of the Third Count was also affirmed for the further reason that it fell "within the purview of *United States* v. *Jerrold Electronics Corporation*, E. D. Pa. 1960, 187 F. Supp. 545, aff. 365 U. S. 567 and is insufficient for the additional reason that 15 U. S. C. A. § 14 does not apply to tie-ins involving services." (Pet. A-6).

ARGUMENT

Petitioner asserts only one reason for certiorari—that the so-called "commodity issue" is an important question which needs "clarification" by this Court (Pet. 6-7). This petitioner unsuccessfully urged that same reason when the case was before this Court two years ago.* It should be rejected again. There is no conflict of decisions and petitioner asserts none. The holdings below are consistent with, and indeed compelled by, the language of Sections 2(a) and 3 of the Clayton Act, their legislative history and interpretation, and their long-standing construction by the courts, the enforcement agencies and the commentators. Accordingly,

*In its previous petition for certiorari, No. 710, O. T. 1959, Amana devoted half of its "Reasons for Granting the Writ" to the argument:

> "The Writ Should be Granted Because the Question of Whether Television Time Is a 'Commodity' for Purposes of the Clayton and Robinson-Patman Acts Is an Important Question under the Federal Antitrust Laws That Should Be Decided by This Court."

Certiorari was nevertheless denied, 362 U. S. 928 (1960).

the issue petitioner tenders is both well settled and without public importance and does not warrant consideration by this Court. Instead of presenting an unresolved question of public importance, the petition simply reveals a private litigant seeking review of a particular matter which was correctly decided against it.

The agreements which are the foundation of Amana's counterclaim obligated CBS to produce and broadcast The Phil Silvers Show under Amana's sponsorship so that Amana could advertise its products. The transaction was comparable to that in which any advertising medium provides its services for disseminating an advertiser's message to the public. No matter what semantic characterization is given to such a transaction, it is clear that it does not involve any "commodities" within the meaning or intent of Sections 2(a) and 3 of the Clayton Act.

Whether called television time, sponsorship identification, or services, what CBS provided for Amana was only services and intangibles which are not "commodities" within the ordinary meaning of the language of Sections 2(a) and (3), as the Court below held.* Amana concedes as much and is

*This is so because it appears from the statutory language and its context that the term "commodities", as used in Sections 2(a) and 3 [illegible] intangibles. A contrary construction makes semantic nonsense of the statute, as pointed out in [illegible] Commodities in Commerce Jurisdiction of Certain Under the Robinson-Patman Act of [illegible] 1955, 11[illegible] (1958). This is also confirmed by the fact that [illegible] to contracting to furnish [illegible] to all purchasers [illegible]

Reading the [illegible] to involve any "commodity" within the statutory context, Amana [illegible] that legal [illegible] [illegible] [illegible]

accordingly forced to argue that those Sections should nevertheless be construed to apply because of their "clear remedial purpose". (Pet. 7-10). But it is the function of the courts "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northern Ry.*, 343 U. S. 562, 575 (1952), and this Court has recently rejected an identical appeal to "remedial purpose" in a closely analogous situation. *Blau v. Lehman*, 368 U. S. 403 (1962).

Moreover, the statute's inapplicability to this transaction, which appears from its terms and phrascology, is confirmed by the legislative history and interpretation of the statute. The bill which became the Clayton Act was explained in the accompanying report submitted by Congressman Clayton as applying to "goods, wares and merchandise", to "manufacturers" and "dealers", etc.—terms wholly inconsistent with any intent to reach transactions involving only services or intangibles such as the "privilege of sponsorship identification". See H. R. Rep. No. 627 at 8, 11, 63d Cong., 2d Sess. (1914). See also S. Rep. No. 698, 63d Cong., 2d Sess. (1914). The same expressions of intent pervaded the enactment in 1936 of the Robinson-Patman amendment to Section 2. The amendment's scope was repeatedly explained in terms of "merchandise distribution", "goods", "manufacturers, wholesalers and retailers". See, *e.g.*, Congressman Patman's statements at 79 Cong. Rec.

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approach and characterized the situation as "a purchase by Amana of the privilege of having its name identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising its products" and as "a purchase of the right or privilege of sponsorship identification with the broadcast of a television program and the use of its time, facilities and goods for product advertising". (Pet. A 15). The agreements themselves set forth in CBS' reply (Br. App. 7 & 21 & 31) call merely for the services of producing and broadcasting the Perry Como show under Amana's sponsorship for the purpose of advertising its products.

9078-79 (1935); 80 Cong. Rec. 7885-87, 8111 (1936). Moreover, it was authoritatively explained by Congressman Patman that the amendment did not apply to services generally and to advertising in particular. PATMAN, THE ROBINSON-PATMAN ACT (1938):

"Question. Does the Robinson-Patman Act apply to sale of magazine or other advertising space?

"Opinion. No. The act applies only to commodities sold for use, consumption or resale in commerce. (p. 75)

"Question. Does the Act cover and include the sale of services?

"Opinion. The Act applies only to *commodities* sold for use, consumption, or resale in commerce. * * * But in the sense that your question is intended, the Act does not apply to service businesses. (p. 98)".

It was likewise expressly stated in the Senate that Section 2(a) of the amendment was not intended to apply to the services provided by advertising media.**

* These substantially contemporaneous and authoritative statements of Congressman Patman are entitled to great weight in construing the Act he co-authored. See [illegible] 355 U. S. 373 at 382 (1958), in which the Court gave substantial weight to statements made by [illegible] in charge of the bill on the floor of the House during the course of the debate preceding passage of the Act, before the enactment of the Senate amendments. Senator Logan, also [illegible] chairman of the Subcommittee [illegible] following colloquy (80 Cong. Rec. 8113 (1936)):

"Mr. Gore. I should like to ask the Senator from Kentucky what application the present rule under the Robinson-Patman law have to newspapers, which usually sell their space through brokers or agencies. Would the proposed amendment change in any part respecting advertisements based on or measured by the amount of advertising carried?

"Mr. Logan. No. I may say to the Senator from Oklahoma that the only thing the bill attempts to [illegible]

Nor has Congress' understanding of the scope of Sections 2(a) and 3 changed. As recently as 1957, it unequivocally indicated that services—particularly those involved in television network broadcasting—were not commodities subject to Sections 2(a) and 3. After extensive hearings on the television broadcasting industry, the Antitrust Subcommittee of the House Judiciary Committee concluded that the very practice which petitioner challenges here was beyond the reach of Sections 2(a) and 3 because only services were involved, and each of those Sections "covers only tangible commodities and not services." H. R. Rep. No. 607, 85th Cong., 1st Sess., pp. 61-68, esp. pp. 66-67 (1957).* The Subcommittee stated that it would consider a possible amendment to make Sections 2 and 3 applicable to services as well as commodities. Id, p. 67. For that purpose, Chairman Celler introduced H. R. 8277, 85th Cong., 1st Sess. (1957), which would have expanded the term "commodities" in, and hence, the scope of, Sections 2 and 3 to include "services". However, that proposal failed of adoption, even in committee.

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advertising is to provide [in Section 2(d)] that the allowance made for advertising purposes shall be used for the benefit of the seller, and for the benefit of the buyer no further than he is benefited by advertising the particular line of goods. The evil sought to be remedied is that these large advertising allowances are forced

* * *

"Mr. GORE. Then, if a newspaper charged $10 an inch for 10 inches, it would not be required to charge $10 an inch for 100 inches?

"Mr. LOGAN. No; the bill does not require anything of that kind."

Senator Robinson, the co-author, adopted Senator Logan's explanation. 80 Cong. Rec. 3119 (1936).

*The Subcommittee's conclusion was reiterated by its Chairman, Celler, *Antitrust Problems in The Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB., 549, 560-570 (1957).

In accordance with the statutory language and legislative history, the consistent judicial construction has been that Sections 2(a) and 3 do not apply to services or other intangibles. See *e.g., Electrical, Inc. v. Public Service Interstate Transp. Co.*, 72 F. 2d 761 (3d Cir. 1934); *cert. denied*, 293 U. S. 626 (1935); *General Shale Products Corp. v. Struck Const. Co.*, 132 F. 2d 425 (10th Cir. 1942), *cert. denied*, 318 U. S. 780 (1943); *United States v. Investors Diversified Servs., Inc.*, 102 F. Supp. 645 (D. Minn. 1951); *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E. D. Pa. 1960), *aff'd* 365 U. S. 567 (1961).*

In addition to this settled course of decisional law, the administrative construction of Sections 2(a) and 3 also compels the conclusion that the instant transaction does not involve any "commodity". The Federal Trade Commission long ago decided that advertising space is not a "commodity" within the meaning of Section 2(a). See 81 Cong. Rec. Appx. 2330-2337 (1937).** The Department of Justice referred to that opinion in explaining its decision to proceed under the Sherman Act, instead of the Clayton Act, in the *Times Picayune* case—see 345 U. S. 594, 600 n. 27 (1953). And only recently the Department of Justice conceded in the *Jerrold Electronics* case that Section 3 did not apply to defendant's refusal to sell television equipment unless the buyer entered into a service contract, because that section, by its terms, only concerns "goods, wares, merchandise,

*See also *Auto Acetylene Light Co. v. Prest-O-Lite Co.*, 276 Fed. 537 (8th Cir. 1921), *cert. denied*, 258 U. S. 622 (1922); *United States v. Dental Supply Houses Combining Against Mail Order Competition*, 116 F. Supp. 81, 87 (E. D. Mich. 1953); *Cf. Scott Publishing Co. v. Columbia Pictures Publications, Inc.*, 180 F. Supp. 754, 770 (W. D. Wash. 1959), *aff'd*, 293 F. 2d 15, 20 (9th Cir.), *cert. denied*, 368 U. S. 930 (1961); *Nelson-Ball-Bond Mfg. Co.*, [61] F. Supp. 731, 732 (W. D. S. C. 1958), *aff'd*, 262 F. 2d 550 (4th Cir. 1959).

**A compendium of cases prepared by the Federal Trade Commission at Congressman Patman's request and published in the Congressional Record.

machinery, supplies, or other commodities." (15 U. S. C. A. § 14). It does not apply to tie-ins involving services." 187 F. Supp. 545, 554 (1960).

The view of the agencies charged with enforcement of Sections 2(a) and 3—that those sections do not reach transactions of the sort here involved—is most eloquently expressed by the absence of any proceedings against the television industry by either the Federal Trade Commission or the Department of Justice for violation of those sections. Just "as established practice may shed light on the extent of power conveyed by general statutory language so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 453 (1922).

The commentators, too, hold the same view that television broadcasting transactions of the sort presented here are beyond the ambit of Sections 2(a) and 3. Chas. Dvorak, THE MODERN LAW OF ADVERTISING AND MARKETING, p. 18 (1948) states:

> "The insertion of an advertisement in a publication or its announcement over the airwaves does not involve the purchase or sale of commodities. . . ."

Congressman Celler concurred in that view. Celler, *Anti-trust Problems in the Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB. 349, 360-70 (1957).* See also Rowe, *Discriminatory Sales of Commodities in Commerce, Jurisdictional Criteria Under the Robinson-Patman Act*,

* "Congressman Celler's view, [illegible] considerable weight, [illegible] he is Chairman of the House Judiciary Committee and the Antitrust Subcommittee which [illegible] Commission to prevent it from acting, but [illegible] in these hearings and debates [illegible] and was [illegible] amendment and was [illegible] broadcasting.

67 YALE L. J. 1155, 1163-65 (1958); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 51 (1958); Handler, *Recent Antitrust Developments*, 13 RECORD OF N. Y. C. B. A. 417 (1958), and ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS, p. 78 (1937).

In short, those concerned with the meaning and intent of Sections 2(a) and 3 of the Clayton Act, especially Congress and the enforcement agencies, unanimously support the decision below that intangibles and services, such as those here involved, are not "commodities" under either of those sections. That decision is accordingly correct. For the same reason the so-called "commodity issue" lacks public importance, particularly since it is presented by a litigant who, having released any claims which it might have had under the Sherman Act, now seeks to further its private interests by urging an unwarranted distortion of the Clayton Act, contrary to the settled understanding of its scope and the industry practice which has grown up in

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*While apart from the [illegible] Amana's contention that the [illegible] of any commodity, as [illegible] Section 2(a) and 3 of the [illegible]

the light of that understanding.* This case, therefore, does not present any question warranting any further review. Certainly, it furnishes no occasion for the "final determination of the statute's scope" with its "far-reaching consequences" which Amana purports to seek "for the entire publications industry" and for the guidance of the Federal courts. (Pet. 6, 12-14). As we said two years ago, in opposing this same argument by Amana, it will be time enough for this Court to consider the matter if a conflict should develop. See Brief for the Respondent in Opposition, No. 710, O. T. 1959, p. 18.

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*The consistent and long-standing views of Congress, the courts, enforcement agencies and commentators that Sections 2(a) and 3 are not applicable to transactions of the kind here involved have, of course, been followed in the practices of the advertising media. See, *e.g.* EDWARDS AND BROWN, RETAIL ADVERTISING AND SALES PROMOTION, p. 430 (1950); FREY, ADVERTISING, pp. 434-436, 482 (1947); HALL, THEORY AND PRACTICE OF ADVERTISING, p. 597 (1926); R. App. 45-93. This Court has repeatedly emphasized the significance of such considerations and has accordingly held that Congress, which acts prospectively, "is the proper agency to change an interpretation of [an] Act unbroken since its passage, if the change is to be made." *Blau v. Lehman*, 368 U. S. 403 (1962), and see, *e.g.*, *Brotherhood of Maintenance of Way Employes v. United States*, 366 U. S. 169, 179 (1961); *Toolson v. New York Yankees, Inc.*, 346 U. S. 356, 357 (1953); *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470, 478 (1952); *Helvering v. Griffiths*, 318 U. S. 371, 403 (1943); *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U. S. 349, 352 (1941); *United States v. State Bank of North Carolina*, 6 Pet. 29, 39-40 (1832). The inapplicability of Sections 2(a) and 3 of the Clayton Act to the transaction in this case, of course, does not mean that the practices of advertising media are necessarily immune from scrutiny under the antitrust laws. There are the proscriptions of the Sherman Act, but that Act is not involved here since Amana voluntarily released any claims it might have had thereunder.

CONCLUSION

For the reasons stated, the petition should be denied.

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February 21, 1962.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 27 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 684

AMANA REFRIGERATION, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In its brief in opposition to Amana's petition CBS has chosen to ignore the principal question presented by that petition, namely, whether or not the "commodity" issue is of sufficient importance that it should be decided by this Court. Having no sound argument to refute the obvious importance of the "commodity" issue, CBS has devoted its opposing brief to a complete presentation of its arguments on the merits of that issue. The purpose of this short reply brief is not to present Amana's position as to each of these arguments, but merely to point up the fact that these same arguments were made by CBS in the Court below, were answered by Amana, and were (except for the Court's reliance upon one phrase of the Clayton Act) either expressly rejected or ignored by that Court.

1. **Case Law.** The attempt by CBS in its opposing brief to characterize the "commodity" issue as having been settled by decisional law fails upon even a cursory reading of the cases cited in its brief. While Amana, in its principal brief filed with the Court below, discussed cases it considers to be in support of its position on this issue, the Court considered the instant case to be one of first impression and expressly rejected the argument that any case law was determinative. Specifically, the Court stated (Petition, A-6) that the cases cited by both parties were either irrelevant or "afford no real guide to the resolution of the issue."

2. **Legislative History.** The CBS argument based on legislative history is the very same argument presented unsuccessfully to the Court below. This argument focuses primarily upon post-enactment opinions as to the statute's coverage, the most unreliable source of Congressional intent. Specifically, the CBS contention based on Congressman Celler's proposed amendatory legislation (as to which there was no consideration given by the Congress inasmuch as the bill died in Committee) is very similar to the argument which was rejected by this Court in *United States* v. *E. I. du Pont de Nemours and Co.*, 353 U.S. 586 (1957), a case involving the scope of Section 7 of the Clayton Act *prior* to its amendment. Suffice it to say that, after the Court below "carefully considered" the history of the Clayton and Robinson-Patman Acts, it expressly rejected such history as a basis for decision of the "commodity" issue. (Petition, A-5.)

3. **Administrative Interpretation.** The CBS argument based on administrative interpretation has reference to the alleged positions of the Federal Trade Commission and the Department of Justice with respect to the "commodity"

issue. Answering this very same argument in the Court below, Amana pointed out that its factual premise was erroneous. The 1937 one-sentence opinion of the Federal Trade Commission regarding advertising space was expressly limited to the "circumstances" of the particular case to which it had reference—thereby implying that advertising space could, in the opinion of the Commission, be a "commodity" under *other* circumstances. And the Department of Justice changed its position on this issue after this Court handed down its decision in the *Times Picayune* case. This change in position is evidenced by the fact that, in its complaint filed in the Kansas District Court in 1959 (*United States* v. *Wichita Eagle Publishing Co.*, 1959 Trade Cases, par. 69,400), tie-in sales of advertising space were alleged to be violative of Section 3 of the Clayton Act as well as the Sherman Act. In any event, as stated by this Court in *du Pont:*

> "This Court has the duty to reconcile administrative interpretations with the broad antitrust policies laid down by Congress. Cf. *Automatic Canteen Co. of America* v. *Federal Trade Comm.*, 346 U.S. 61, 74, 73 S.Ct. 1017, 1024, 97 L.Ed. 1454. The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the Act." 353 U.S. at 590 (1957).

4. **Nature of Television Time.** In its opposing brief (p. 5) CBS purports to take the position that it is immaterial whether the Facilities Agreement involved essentially "services" or the intangible right of product advertising and sponsorship identification. At the same time, however, it makes repeated and emphatic reference throughout its brief to the "services" rendered by CBS

under that Agreement.* This "services" contention was strongly asserted by CBS in the Court below and flatly rejected by that Court. Instead, the Court held that the intangible purchased by Amana from CBS under that Agreement was ". . . the privilege of having itself identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising its products." (Petition, A-5.) Expressly recognizing that one of the accepted definitions of "commodity" includes "privilege", the Court nevertheless decided the issue against Amana on the basis of *one phrase* occurring in Section 3 of the Clayton Act, a phrase which does *not* occur in Section 2(a) of that statute.

5. **Semantic Arguments.** CBS argues here, as it did below, that usage by Congressional committees and legislators of terms such as "chain stores", "merchandise", and "manufacturer" are inconsistent with the statute's applicability to intangibles. The fallacy in such argument, demonstrated in Amana's reply brief below, lies in its disregard of the fact that such terms are *equally inconsistent* with the statute's applicability to many situations and persons clearly covered. Perhaps reflecting the *inducement* for passage of the Robinson-Patman Act, such references, and the Congressional concern over chain-store abuses, by no means limits the outer reaches of the statute. What was said recently by this Court regarding Section 2(e) of the Act is equally applicable to Section 2(a):

> "This practice was one of the chief targets of § 2(e) of the Act. But it was not the only means by which the

* It should be noted on this score that the "services" listed in the second footnote appearing on page two of the CBS brief *may* have been performed "under" the Facilities Agreement, but they were not performed *pursuant to* that Agreement. The only essential *obligation* of CBS under that Agreement was to "cause television stations . . . to broadcast" the sponsor's program (CBS Appendix, p. 21). Amana was not concerned *how* this was done, whether by "interconnecting microwave relays" or otherwise, nor is any other sponsor so concerned.

brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination. (*FTC* v. *Henry Broch & Co.*, 363 U.S. 166 at 170 (1960))

With respect to CBS' reliance on the semantic argument of Mr. Rowe in his article in 67 Yale L. J. 1155 (1958), suffice it to say that two years earlier Mr. Rowe, referring to *Times-Picayune*, stated—and his statement epitomizes the current status of this issue—that the meaning of "commodity" was "a hazy proposition." (Petition, p. 10.)

6. **Practical Construction.** In the footnote appearing on page 12 of its brief, CBS sets forth a condensed version of the argument it presented to the Court below under the label, "practical construction". The inapplicability of the cited cases and the inherent fallacy of this argument were demonstrated by Amana in its reply brief filed with the Court of Appeals. This argument actually amounts to no more than a plea to maintain the status quo without regard to the anti-competitive consequences of the prevailing method of doing business on the part of the networks.*

CONCLUSION

The entire position of CBS in its opposing brief is predicated upon its tongue-in-cheek statement that the

* The reference by CBS, in the last sentence of the same footnote, to the continuing applicability of the Sherman Act to the networks ignores the distinct differences in burden of proof regarding competitive injury as between the Sherman and Clayton Acts. What is more important, if the decision of the Court below is allowed to stand, *one* of the practices of advertising media—price discrimination—*will* be "immune from scrutiny under the antitrust laws." In other words, unless the holding of the Court of Appeals is reversed, the television networks can, with complete immunity, discriminate in price in favor of their large sponsor-customers, even though such discrimination severely injures both competition and the disfavored sponsors.

"commodity" issue is "well settled". On the contrary, the unsettled status of this issue is reflected on every page of the opinion of the Court below which rejected the principal arguments of CBS and clearly decided the issue as a matter of first impression. The wishful conclusion of CBS—that the "commodity" issue is "well-settled"—also ignores this Court's opinion in *Times-Picayune* which compelled the Second Circuit to reach a conclusion diametrically opposed to that of CBS:

> "The correctness of the dismissal of this action raises, however, *important and apparently unresolved questions under the Clayton Act*. Thus, the Supreme Court reserved in the Times-Picayune case the question whether advertising space is a 'commodity' within the meaning of Section 2 of the Act. See 345 U.S. at Page 610, note 27, and cases cited." (*Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522 at 527 (1956): emphasis added.)

Finally, the request of CBS that this Court defer the necessary resolution of the "commodity" issue until a conflict develops among the Courts of Appeal should not be seriously considered. The importance of this issue, for all of the reasons set forth in Amana's petition, requires that it be decided without further delay.

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